

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA J. HAMAMA, et al,

Petitioners and Plaintiffs,

-v-

Case No. 17-cv-11910

REBECCA ADDUCCI, et al,

Respondents and Defendants.

PETITIONERS/PLAINTIFFS' MOTION FOR A PRELIMINARY
STAY OF REMOVAL AND/OR PRELIMINARY INJUNCTION

BEFORE THE HONORABLE MARK A. GOLDSMITH

Detroit, Michigan, Friday, July 21st, 2017.

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WITNESSES:

EXHIBITS

NONE

1 Detroit, Michigan.

2 Friday, July 21st, 2017.

3 At or about 10:42 p.m.

4 -- --- --

5 THE CLERK OF THE COURT: Please rise. The United
6 States District Court for the Eastern District of Michigan is
7 now in session, the Honorable Mark Goldsmith presiding. You
8 may be seated.

9 The Court calls case number 17-11910, Hamama versus
10 Adducci. Counsel, please state your appearances for the
11 record.

12 MS. AUCKERMAN: Miriam Auckerman for the petitioners.

13 MS. RABINOVITZ: Judy Rabinovitz for the petitioners.

14 MR. STEINBERG: Michael J. Steinberg for the
15 petitioners.

16 MS. SCOTT: Kimberly Scott for the petitioners.

17 MS. RICHARDS: Wendolyn Richards for the petitioners.

18 MR. SWOR: William Swor for the petitioners.

19 MR. SILVIS: William Silvis, Department of Justice
20 for the respondents.

21 MR. CELONE: Michael Celone, Department of Justice
22 for the respondents.

23 THE COURT: Okay. Good morning, everybody. We're
24 going to have a hearing now on the petitioners' motion for a
25 preliminary injunction. Go ahead.

1 MS. AUCKERMAN: Good morning, your Honor.

2 THE COURT: Morning.

3 MS. AUCKERMAN: The last time we were here, you
4 wanted to know and it was only a little over a week ago, you
5 wanted to know what we were going to brief and I think that
6 question reflected that you've already made findings on the
7 context of temporary relief that concern the same issues that
8 are now before you in the context of preliminary relief.
9 Nothing about the law or the facts has changed since you made
10 those findings.

11 You correctly found that extraordinary circumstances
12 exist that would render petitioners' claims meaningless unless
13 the Court intervenes to stay their deportation while review of
14 their removal orders proceeds before the immigration courts and
15 the Court of Appeals. That has not changed. You also
16 correctly found that petitioners face irreparable harm given
17 the significant chance of persecution, torture or even death
18 if they are returned to Iraq and that that far outweighs any
19 conceivable governmental interests here. That also has not
20 changed.

21 You found that normally the administrative process
22 provides adequate review, but you correctly found that here
23 there are extraordinary circumstances and because of that
24 confluence of grave, real-world factors applied to these very
25 extraordinary circumstances, you found that you have

1 jurisdiction in order to preserve the fundamental right to
2 habeas corpus. That also has not changed. So we focused our
3 brief and I'd like to focus my comments today on what this case
4 is really fundamentally about which is what is required under
5 those extraordinary circumstances to give the petitioners a
6 meaningful opportunity to have their claims heard.

7 The government has conceded when we were here last
8 that the petitioners cannot be removed -- the government cannot
9 remove people to countries where they face persecution and
10 torture and their position is that the petitioners so seek that
11 relief through motions to reopen with review by the Court of
12 Appeals and fundamentally we agree with that. The petitioners
13 brought this case because they want their a claims to be heard
14 through that process, but without this Court's intervention and
15 without the stay that this Court has entered and without a
16 preliminary stay of removal going forward, that was impossible
17 and remains incomplete.

18 So the real dispute here is about whether petitioners
19 should have an opportunity to access, to actually access that
20 administrative court system and with an opportunity for review
21 by the Court of Appeals or whether the government can deport
22 people without allowing them to access that system. The
23 question really is what relief should this Court grant so the
24 petitioners can have a meaningful opportunity to have their
25 claims heard within the immigration system.

1 So we focused as I said our brief on really what we
2 think -- we took to heart this Court's concern about
3 practicality and workable, umm, workable relief and what we've
4 proposed and is set out in more detail in our brief is, is a
5 process that reflects the very grave circumstances here and the
6 real-world realities. As is clear from the declarations that
7 we submitted, one of the real barriers here is access to the
8 relevant documents. You need in particular an A-file and the
9 record of proceedings in order to prepare an adequate motion to
10 reopen and so what we and then we also looked at and we talked
11 to those declarations from expert immigration practitioners
12 about what this process involves to file a motion to reopen.
13 Some of those practitioners suggest that you need six months.
14 We're actually proposing a shorter time frame than that because
15 there has been really an outpouring of support from the legal
16 community. We've been working very, very hard to try to
17 identify counsel for individuals although many, many remain
18 unrepresented because of all of the barriers that we've talked
19 about and that this Court is well aware of and so what we're
20 proposing is a process whereby individuals would have three
21 months to file their motions to reopen. That filing would be
22 triggered, that date, that three months would be triggered by
23 the government's production of the A-file and the record of
24 proceedings that is entirely within the government's control.
25 That can take a long time if it's done through FOIA which is

1 one of the obstacles that individuals have faced to filing
2 these motions, but of course the government could just simply
3 produce them if it wanted to expedite the process, so the
4 government controls that timing. Then anyone who files a
5 motion to reopen would be protected while the immigration judge
6 or the BIA are deciding those until those petitions for review
7 filed with the Court of Appeals an opportunity to seek a stay
8 with the Court of Appeals. We realize this is an ambitious
9 time frame given what the record shows about how long it is,
10 how long it takes to bring these motions, but we wanted to be
11 responsive to the Court's concerns about practicality and about
12 the need to really have a standard framework within which to
13 operate.

14 So the way this would work is that if an individual
15 doesn't file a motion within three months, three month's stay
16 would expire. If they do file it, they would be protected with
17 the opportunity to file, umm, until they've reached the stage
18 of filing the petition for review and seeking a stay in the
19 Court of Appeals.

20 THE COURT: So would it continue until the Court of
21 Appeals acted on a motion for a stay in that court?

22 MS. AUCKERMAN: I think what we were proposing is
23 that it would continue until they've had the opportunity to
24 file it. At that point it would be with the Court of Appeals.
25 Certainly if you wanted to extend it until the Court of Appeals

1 acted on it, that would -- we would be fine with that, but I
2 think the issue is, is -- I mean, you identified that time
3 frame in your earlier, umm, in your -- we took that from your
4 opinion on jurisdiction where you talked about that sort of
5 being the time frame so that's what we were looking at.

6 THE COURT: Well, just to put a fine point on it, if
7 the Court of Appeals decided to reject the motion for a stay,
8 you're not suggesting that this Court's stay would continue,
9 right?

10 MS. AUCKERMAN: No, absolutely not. So at that
11 point, once they filed the petition for review and they filed
12 the stay or if you'd wanted to extend it to, you know, the
13 Court of Appeals has acted on the stay, but at whatever point
14 in the Court of Appeals process, at that point then the stay
15 would expire. So the stay expires at different times -- the
16 time frame is uniform for everyone, but the stay would, the
17 length of the stay would depend obviously on people's
18 individual, how quickly they proceed through on the process and
19 some individuals may decide that they don't want to seek, you
20 know, they may not have the financial resources, they may have
21 other reasons why they don't want to proceed all the way to the
22 Court of Appeals, but that would, umm, the stay would expire at
23 whatever point their process has run. Individuals would also
24 have the opportunity umm, you know, there may be individuals
25 who do for whatever reason decide that they do not want to

1 pursue further immigration relief. The Court just signed a
2 stipulation this morning with respect to one individual so
3 there might be individuals like that particular person who in
4 his case as this Court knows, he recently arrived from Iraq,
5 his family's already back in Iraq, he doesn't want to be
6 detained indefinitely and so has reasons he doesn't want to
7 proceed to seek further immigration relief. He may not have as
8 strong a claims. Other individuals who've been living in the
9 community for decades, have very strong claims would be, you
10 know, would want to pursue the entire process so it's designed
11 to be a workable system where an individual who decides that
12 they don't want to be, umm, pursue further immigration relief,
13 that they would simply that individual through counsel would
14 notify the Court of that and then the stay by its terms would
15 not apply to that individual. We'd want it to be as
16 administratively easy on the Court as possible so the Court
17 isn't constantly look -- I mean, we think it's going to be a
18 small number cases frankly where this would be an issue, but we
19 wanted something that was quite administratively easy for the
20 Court to address.

21 THE COURT: So let me ask you, often with motions for
22 preliminary injunction, if they're granted, there is still a
23 final hearing regarding making that injunction permanent. I
24 don't know if our circumstances would fit that classical model.
25 Do you see the need for a final hearing on this issue or would

1 this motion effectively decide this piece of the case?

2 MS. AUCKERMAN: Your Honor, I think one of the
3 things, umm, one of the answers to that is the other piece of
4 relief that we've requested which has to do with ongoing
5 reporting because it's, you know, we know -- I think it's hard
6 to know exactly how this process is going to play out. We can
7 anticipate that regardless of how this Court rules, there are
8 likely to be appellate proceedings and obviously we don't know
9 how quickly people are going to find counsel.

10 I think there's a lot of moving pieces here. We know
11 for example that the information that we received from the
12 government was effective July 1. We know additional people
13 have been arrested since then so one of the things that we're
14 asking for is ongoing reporting of the information needed to
15 monitor this system. I'm hopeful that this will be, that this
16 will be all that would be needed, but it's hard to know and so
17 I think what we're asking for now is certain preliminary and
18 then I think the parties, hopefully we can and depending on
19 what happens with the legal rulings in this case the parties
20 may be able to work something out. If that's not the case, if
21 there are problems with the implementation and as you look at
22 the monitoring we may need to come back to you, but I think
23 we're all reasonable people here.

24 THE COURT: What's the purpose of the ongoing
25 reporting in terms of our case?

1 MS. AUCKERMAN: So if -- a couple things. One is
2 that there are new individuals being detained. There are two
3 affidavits and declarations before you in the filing I believe
4 from this morning, some individuals who have been detained
5 since, umm, since the stay, the initial stay was entered. We
6 don't have information, you know, the information that we have
7 from the government is effective July 1 so as new people are
8 being detained as class, as prospective class counsel, we would
9 obviously want to know about those individuals, work to
10 identify, make sure that they know what their rights and
11 obligations are under any order that this Court may enter, work
12 to identify counsel, but it's also important, one of the things
13 we're asking for in terms of that ongoing reporting is not just
14 information about the new people, but also information about
15 when the A-files and the records of proceedings are produced
16 because if as we suggest the time clock starts from when those
17 are produced because that's, those are the essential documents
18 you need to file the motion to reopen. If the time clock
19 starts from then, we obviously need to be able to determine,
20 you know, how many people are filing these motions, are they
21 filing them timely, are they not, who's protected, who's not
22 and so that really is -- I think it's less, you know, it's
23 certainly information that the Court may be interested in if
24 there are further proceedings before this Court, but I think a
25 lot of it has to do with sort of management and monitoring of

1 this so that we can determine is this working which we think it
2 will, we think that, but, you know, to make sure that we're
3 really monitoring the process, making sure that class members
4 are aware of the relief to which we believe they're entitled.
5 Just --

6 THE COURT: I'm sorry, before I move on to another or
7 you move on to something else, you just filed a motion for
8 class certification. How if at all does that relate to the
9 motion for preliminary injunction or ongoing reporting or
10 anything else that's going on in the case? In other words, is
11 whatever time table we establish for that, is that going to
12 need to interface somehow with whatever we're doing here or is
13 it running on a separate track and there really is no
14 connection?

15 MS. AUCKERMAN: Well, it's very clear from the case
16 law and it's cited at the end of our preliminary injunction,
17 preliminary stay brief. It's very clear from the case law that
18 this Court can grant preliminary relief on a class-wide basis
19 prior to ruling on class certification. The Court obviously
20 has already done that with respect to temporary relief. It can
21 easily do that on its, is equally as authorized to do that with
22 respect to the preliminary relief here so there is no need for
23 the Court to, I mean, I guess we had been envisioning that the
24 class certification motion would proceed on it's sort of
25 normal, on a normal time schedule. We wanted to make sure that

1 we had presented it to the Court so that it was clear how we're
2 thinking about the class definition and so forth in terms of
3 crafting the preliminary relief so that it fits the class that
4 we're potential -- that we've identified. As we said in that
5 motion, we really tried to class, to work with the class
6 definition again to be very practical and responsive to this
7 Court's, umm, to this Court's concerns about workability and so
8 that's why we've made some modifications to the proposed class
9 definition. So I think it relates to this motion in the sense
10 that we would anticipate or ask that the Court order
11 preliminary relief for the class as defined in that class
12 motion. As we also said in that motion it's clear that if the
13 government comes back with concerns, the Court always has the
14 ability to modify the class definition. If upon further
15 review, you know, the Court wants to look at that, we think
16 that there is sufficient evidence before the Court to, based on
17 what we know now, to certify the class. I mean, obviously they
18 get the opportunity to respond, but we think that can happen on
19 a regular schedule because the Court is fully entitled to move
20 forward on preliminary relief and obviously we have temporary
21 relief expiring on Monday at midnight and therefore the Court
22 does need to act expeditiously on this motion although not
23 necessarily on the class motion.

24 I would just say with respect to the class motion and
25 the schedule the Court sets there, that the Court, obviously we

1 don't have even the basic class member information that you
2 ordered. We have the initial tranche of information, but there
3 were two tranches of information as you may recall your Honor
4 and that second tranche is due today. We don't have it yet.
5 You noted that at the hearing on that production that that
6 information is clearly relevant to class certification. So it
7 may be that there's additional discovery or issues that would
8 be relevant to class certification. We think that there's
9 sufficient information already, but that's really up to the
10 Court. If the Court would like to see that more fully flushed
11 out or if the government responds with information that we
12 haven't had the opportunity to review, there may be issues
13 there, but we think, I guess I would say for today, your Honor,
14 and just given everything that you have before you, I would set
15 that aside, let that proceed on a normal schedule and move
16 forward with really the, the immediate issue is obviously the
17 preliminary relief in light of the expiring temporary relief.

18 THE COURT: I know that you filed a class
19 certification motion. I haven't reviewed it, but you're
20 telling me that it modifies the definition from the definition
21 you were asking for in the expanded stay motion? Is that
22 right?

23 MS. AUCKERMAN: That's correct. The motion that, the
24 class motion -- so originally we had proposed, umm, I don't
25 have, grab the --

1 (Pause)

2 MS. AUCKERMAN: So the original petition or I should
3 say the first-amended petition had as you may recall a class
4 and two sub, habeas subclasses than was defined as a class of
5 all Iraqi nationals with final orders of removal who have been
6 or will be arrested and detained by ICE as a result of Iraq's
7 recent decision to issue travel documents to facilitate US
8 removal and then there were habeas subclasses related to the
9 Michigan and national respondents.

10 A couple of things that we've proposed in terms of
11 changing that definition. So one of the issues is that, it's a
12 factual one which is that it appears there's some, some
13 question about whether Iraq is actually issuing travel
14 documents or simply accepting people without travel documents.
15 There are declarations cited in the class or attached to the
16 class certification motion that addressed that issue, so we are
17 concerned about whether that factually is even sort of
18 accurate, so we thought that it would be simpler to address
19 that and so let me just give you the definition we're proposing
20 now and I can --

21 THE COURT: When you proceed, read a little more
22 slowly because my court reporter has to get everything down and
23 I can just tell you from experience when attorneys start
24 reading, they tend to speed up, but that doesn't make for a
25 good record so use a, just a normal speaking pace if you don't

1 mind.

2 MS. AUCKERMAN: Do I need to repeat the original
3 definition?

4 THE COURT: I think he's got that.

5 MS. AUCKERMAN: He's very, very capable. All right,
6 well, let me do the proposed definition then. So all Iraqi
7 nationals in the United States who had final orders of removal
8 on June 24th, 2017 and who have been or will be detained for
9 removal by U.S. Immigration and Customs Enforcement, and so
10 what that does so it's who had final orders of removal on June
11 24th, 2017, that's the date of the first-amended petition and
12 and who have been or will be detained for removal by ICE. So
13 we get rid of this sort of confusion about whether in the
14 original definition which we put together, you know, at the
15 early outset of this about whether it's as a result of the
16 recent decision to issue travel documents 'cause it's unclear
17 whether they're issuing travel documents so it's just cleaner,
18 it's objective. It has a specific time frame. Again, this all
19 goes back to workability. We don't want to have to come back
20 to this Court to say is someone in the class or not. We want
21 that to be very clear and objective so that you don't have to
22 deal with questions about that and then given this Court's
23 ruling with respect to expanding the class and this Court's
24 finding that the immediate custodian rule doesn't apply, we do
25 not believe that there was a need for the habeas subclasses in

1 light of this Court's ruling. If the Court wants to have
2 habeas subclasses, we've provided some proposed, essentially
3 the same language for those, but we didn't see that as
4 necessary. It's just simpler to have one single class and so
5 those are really the essential distinctions and just to be
6 clear because I know the Court was concerned about the
7 intersection of the detained and non-detained? So the way that
8 this class is defined or we would propose that it would be
9 defined is again as individuals what had final orders of
10 removal on that date and who have been or will be detained for
11 removal and the idea is that this is like any, in many -- lot
12 of civil rights litigation, there are classes where people get
13 added to the class so in a jail case for example, the class
14 might be defined as individuals who are or will be detained in
15 the jail or a school reform case, individuals who are or will
16 be first-graders in, you know, this challenged reading program
17 or whatever it is and the Sixth Circuit has approved of those
18 kinds of definitions in the Barry v. Lyon case most recently
19 where there was a class of individuals who also actually it's a
20 very comparable case to this one in some ways. It involved
21 administrative rights where everybody had individual claims,
22 but the questions were did the class have due process rights
23 that were similar and the Court found, certified, Judge Levy
24 certified a class there and the Sixth Circuit found the class
25 certification appropriate and that class also was defined in

1 the same way and so the class is, want -- people have become
2 members of the class once they are detained, obviously people
3 are detained before they would be removed so we think that
4 protects everyone, but it's a lot cleaner as a definition than
5 what we had been talking about before. So again we're really
6 trying to address workability and be responsive to the
7 practical concerns that this Court has expressed.

8 So those are really the, would be the focus of my
9 remarks, your Honor. I think as you know, the balance of harms
10 here really weighs in the petitioners' favor. They face the
11 gravest of harms; persecution, torture or even death and they
12 seek a very limited relief which is a stay while they avail
13 themselves of the administrative immigration court process and
14 the opportunity to seek relief from the Court of Appeals.

15 THE COURT: All right. Before you step away, I had a
16 question regarding the government's declaration that there were
17 some 400 Iraqi nationals who have been returned to Iraq over
18 the past 10 years and I believe the position in your reply
19 brief is it's not clear how many of those are people who just
20 showed up at the border and were turned back as opposed to
21 people who had actually come to the United States, lived here
22 for a while and are now being the subject of the removal
23 process. Do you have any way to nail that down? I know we're
24 working on a very short time table, but is that something that
25 you're able to nail down more specifically?

1 MS. AUCKERMAN: I mean, that is information obviously
2 within the government's control and would require additional
3 discovery. I'm looking for that declaration now, but my --
4 that declaration specifically said that they were, umm, that
5 those numbers included voluntary removals so in other words not
6 individuals like the people that we're talking about here in
7 the class who are seeking, I mean, who have been living in the
8 community and are, you know, don't want to be removed, but much
9 more like the individual whose stipulation you signed and
10 individuals who want to be voluntarily removed. We also filed
11 this motion a declaration that was filed in a different habeas
12 action in this court by an ICE officer saying that there have
13 not been these charter flights. As to my understanding, it's
14 the charter --

15 THE COURT: That there have not been what?

16 MS. AUCKERMAN: That there have not been the charter
17 flights. My understanding is that the charter flights are what
18 used to essentially forcibly remove people, right? So there's
19 going to be a distinction between people who are arriving at
20 the border or apprehended at the border and then decide that
21 they want to return and individuals like the people that are,
22 were arrested here who have been living in the community, had
23 these final orders of removal, had no idea that they were going
24 to be faced with this and so again that's information in the
25 government's control, but that that other, the other

1 declaration that we filed this morning from ICE Officer Clinton
2 says that there have not been any of those charter flights for
3 six, at least six years, more than six years and so we know and
4 what we know indisputably is that there are final orders of
5 removal going back to 1986 I believe or -- '86 I believe is the
6 oldest one that we have and those were not, the government has
7 not taken action to remove those individuals. We also know
8 that even saying that there were removals back six years ago,
9 that it's in disputable from the record that country conditions
10 have changed dramatically since then that, there has been just
11 a tremendous deterioration in Iraq and that the individuals who
12 are part of this prospective class face really, really grave
13 dangers.

14 One thing I wanted to note with respect to the timing
15 here is that if you look at, the government says oh, 2014. If
16 you actually look at the declarations, in particular the new
17 declaration that we filed from expert, I think it's Daniel
18 Smith, declarations from Rebecca Heller, Mark Lattimer, it's
19 very clear that country conditions have changed since '14 as
20 well. So for example I believe it's one of the Lattimer
21 declarations talks about how in '16 there were bombings that
22 affected Shiite Muslims. There is a discussion in the Smith
23 declaration about the upcoming referendum in Kurdistan and the
24 threat that that poses to Chaldeans and Yazidis and so it's not
25 as if there's some magical time point. What is clear is that

1 there are changed country conditions that are very, very, very
2 dangerous for individuals. It's also clear that the U.N. high
3 commissioner for refugees has said that individuals should not
4 be returned and it's also clear that anyone who is American
5 affiliated and all of these individuals are going to be
6 American affiliated other than someone who's just arrived in
7 the country perhaps, but all these individuals are going to be
8 American affiliated, that they face tremendous dangers simply
9 as a result of being American affiliated, that that's
10 absolutely, absolutely clear. The new declaration suggests
11 that those individuals could end up being detained,
12 interrogated and tortured right when they land in the airport,
13 so the threat here could not be more extreme.

14 THE COURT: Okay, thank you. Mr. Silvis, you going
15 to argue for the government?

16 MR. SILVIS: Sure. Good morning, your Honor.
17 William Silvis on behalf of the Department of Justice. The
18 motion for preliminary injunction and the stay that the Court,
19 is requested here should be denied because it is not available
20 in habeas. Instead the relief that they request is only
21 available within the procedures that Congress specifically
22 designed for review of these types of claims which is a motion
23 to reopen in immigration court and followed by appeal to the
24 BIA and then the petition for review process. That is fully
25 available to everyone in this class, it is fully available to

1 the petitioners and it's a process that allows for judicial
2 review by federal courts in the process of a PFR. That process
3 has been deemed by every Court of Appeals to consider it to be
4 an adequate substitute for habeas and it's been, umm, the --
5 held not to address any suspension clause issues. Those --
6 that process is better situated than this Court to determine
7 that individual circumstances that must be determined to
8 determine whether a stay is appropriate because at the same
9 time they're reviewing whether the stays from removal is
10 appropriate, it also has the ability to review the underlying
11 motion to reopen and any relief that may be available which is
12 in this case largely a CAT claim based on new circumstances.
13 So the procedure in place that Congress has designed for these
14 exact claims is fully adequate and available to everyone in
15 this class and to the petitioners and has been available for
16 some time.

17 In this Court, we haven't seen any viable reason or
18 evidence to deviate from this procedure that Congress created
19 for review of these various or of these very claims themselves
20 and any of the barriers that the plaintiffs have or the
21 petitioners in this case have identified to accessing that
22 process are the very same barriers that anyone would have to
23 access to any adjudicative forum including this Court. The
24 idea that you have to gather documents and that you need
25 records, that's any time you go into a proceeding you have to

1 gather those types of evidence. You certainly couldn't get a
2 preliminary injunction or a TRO in this Court without gathering
3 some time of evidence, so the fact that you have some barriers
4 and that you have to show a claim for a motion to reopen and
5 for a stay, that doesn't make it any different than any other.
6 It doesn't make it any less available and adequate than this
7 Court or any other court to consider those claims.

8 Just on that point briefly because we are talking
9 about jurisdiction, petitioners' counsel mentioned in the
10 beginning that this Court or suggested that this Court has
11 already sort of ruled on the merits of jurisdiction or
12 addressed jurisdiction and that any findings on the TRO are
13 binding and in our brief we just mentioned that at the
14 preliminary stage, those findings that this Court may have had
15 on the harm, extraordinary harm on a TRO basis aren't binding
16 and aren't law of the case so I cite Benefit Pension Trust,
17 which is 888 -- versus the United States, 888 F2d, 111 which is
18 Sixth Circuit case from 1989. So in short --

19 THE COURT: Well, even if they were law of the case,
20 it's a discretionary doctrine. I'm free to revisit any ruling
21 I've made before a final judgment; am I not?

22 MR. SILVIS: You are and in particular your Honor
23 when it deals with jurisdiction, so I just wanted to raise that
24 point as it was made before. There was an assumption that you
25 are now bound on this and that's entirely not the case,

1 especially when we were talking about jurisdiction.

2 So in addition to the fact that these motion to
3 review procedures that fully allow for administrative review
4 and a stay if necessary so that the review can be determined
5 and then judicial review on a PFR, as I said, every court to
6 consider it including the Sixth Circuit has found that those
7 are Constitutionally adequate.

8 THE COURT: On facial basis, correct?

9 MR. SILVIS: On a facial basis to --

10 THE COURT: Well, those were all facial challenges,
11 right?

12 MR. SILVIS: I'm not sure that they wouldn't -- in
13 circumstances, I'm sure people have raised claims that they
14 were denied and they sought to seek a habeas claim there and
15 what they're, to the extent there was a suspension clause
16 challenge or they argued that they were denied habeas relief,
17 they were there so your Honor means as applied, they didn't
18 evaluate whether how the claim was adjudicated created some
19 issues?

20 THE COURT: Right, the particular circumstances as
21 opposed to challenging the system that Congress has erected in
22 principle. Those courts have said in principle it's an
23 adequate system.

24 MR. SILVIS: Well, fundamentally your Honor what's at
25 issue when you're dealing with a habeas and any suspension

1 clause issue that would arise which we submit and we briefed
2 this pretty fully in our brief isn't the issue here, this isn't
3 even a proper habeas, is whether the alternative, assuming that
4 there was a habeas and there was some sort of suspension clause
5 issue, what you're look for in the adequacy of the forum is
6 whether there is an ability to correct any problems in the
7 underlying proceeding and that's clearly the case here. If
8 there were, there are not necessarily problems in this case,
9 but if there were a new basis such as CAT or any protection you
10 would want from withholding, the administrative process in
11 place by filing a motion to open in an immigration court or the
12 BIA depending on where you were procedurally is an entirely
13 adequate process for doing that. It's in the right -- there is
14 no limit, time limit on when you can bring a motion to reopen
15 on that basis, so that's, that would be the concern there and
16 that's, umm, there's no reason why, it doesn't raise any
17 adequacy concerns and it's a completely available forum. I
18 think the fact that it's available is I think belied by the
19 facts of this case. You look at every, all but I think one of
20 the original 10 named petitioners in this case have availed
21 themselves to some extent of that process so even with this
22 Court's stay, a TRO in place, they have gone through and
23 availed themselves of that process.

24 THE COURT: Is the period though since I first stayed
25 the removals a period that needs to be evaluated in light of

1 the fact that I did stay? In other words, that I gave
2 breathing room to some extent to the lawyers who needed to do
3 work, to the detainees who needed to find lawyers and to the
4 immigration courts who needed to process that, so the question
5 I'm raising is the fact that there have been motions filed,
6 stays either granted or denied in the recent past, doesn't that
7 need to be viewed through the lens of the fact that the Court
8 has, this Court has stayed the removal process and taken some
9 of the pressure off of all of the participants?

10 MR. SILVIS: Respectfully, no, your Honor. I think
11 and if you look at the underlying cases, at least two and I
12 think the sheet's on my counter, table here, but of the named
13 petitioners here, several had filed motions to reopen and
14 sought relief earlier so they were aware of this process and
15 they've actually tried to reopen the proceedings in the past so
16 they were clearly aware and have utilized this available,
17 adequate process in the past far before their arrest and far --
18 in 2017 and far before this Court entered the TRO.

19 I think also we offered two declarations in this
20 case, that one was from Sheila McNulty which is assistant chief
21 immigration judge who part of her responsibility is overseeing
22 the Detroit immigration courts and there's fairly detailed
23 information there about the stay process and how many they've
24 received and the exact numbers are mentioned in the
25 declaration, but it's been 87 I think they've received since

1 June, 2017 and I think all of them have been adjudicated and
2 they're not all grants. In some circumstances it's just not
3 appropriate. Someone files a motion to reopen and there isn't
4 any underlying relief, there's no point to granting a stay at
5 that point, but the importance there is that this Court, the
6 stay or the protection of this Court isn't necessary to have a
7 full and fair hearing on any motion -- on any claim that must
8 be brought immigration court. The BIA and the immigration
9 courts are fully capable and in fact adjudicating these motions
10 to reopen and the stays and are fully aware and can be made
11 aware of things that are more difficult for this Court to be
12 made aware of which are whether someone's scheduled for actual
13 removal, whether there's any underlying relief that this person
14 could get, whether there are in more communication with ICE and
15 ERO removal so they know if some, if removal is imminent and
16 they need to act on a stay right away or they know whether they
17 can put it, sort of delay it and put it, adjudicate it in its
18 normal course and frankly that's something that this Court on a
19 class-wide basis or large basis isn't going to be able to do.
20 So and we see the effect of that a little bit. There's a broad
21 stay or TRO in place now and we have individuals that don't
22 want to be part it. We've had the stipulation that your Court,
23 your Honor entered last night or this morning and there's other
24 people we've reported from our declarations who want to go as
25 well and I think that's why it's not well-tailored to

1 protecting any right that someone would have, an administrative
2 right or a statutory right to raise a withholding claim. It is
3 not well-tailored to that point where the immigration system,
4 the admin process, the motion to reopen and the stay is more
5 reactive, in a better situation to do it and does in fact do it
6 and then they've had, they've adjudicated these and the same is
7 true also at the Board. The Board has an entire unit that
8 deals with these emergency stays and they have no interest in
9 losing and having a claim not with a motion to reopen that is
10 not adjudicated because someone's removed. So, you know, these
11 procedures are already in place. There is nothing new or
12 extraordinary about this case that would be any different from
13 any other situation where an individual has this type of claim,
14 they want to raise it, they're worried about getting removed
15 and they want to file a stay and there's entirely adequate and
16 available procedures in the immigration court and the BIA for
17 that and those what are, they're declarations Exhibit A and B
18 that as part of the respondents' submission today.

19 Just addressing, too, unless the Court has more
20 questions about that process, the -- just what's extraordinary
21 about this case and we submit that there's really nothing
22 extraordinary about it. There had been removals to Iraq as
23 your Honor noted earlier, at least since back fiscal year 2007
24 and I'm sure going back much further than that, but that's the
25 date we have.

1 THE COURT: Do you have a breakdown how many of those
2 are people who are turned back at the border as opposed to
3 people who are similarly situated to the petitioner's class?

4 MR. SILVIS: I guess I don't understand to the -- I
5 don't know voluntary departure of that, but I guess what I
6 don't understand what the difference would be is in a sense, is
7 what we're saying is whether -- you would still have the
8 availability to seek any relief in our system. Turned back at
9 the border, you can still present yourself at the border and
10 say, and make a claim for asylum or make a claim for some
11 relief to be able to stay in the United States and that's what
12 the individuals here, the individuals in this case may already
13 be here and are fighting removal, but ultimately if there's
14 relief available, I don't think it makes much of a distinction.
15 The point the government makes is that people are going back to
16 Iraq and to the extent that some people may have colorable or
17 certainly more serious claims that may qualify for relief in
18 the removal context under CAT or asylum, that's a highly
19 individualized process. It depends where the individual's
20 identifying characteristics, where can they relocate within the
21 country? When you're talking about people with serious
22 criminal backgrounds and they might only qualify for the most,
23 the barest form of relief which would be a deferral of removal,
24 there has to be willful indifference of the government, in this
25 case Iraq, to the plight of that individual. So the point

1 being only for the purposes of today that that's such a highly
2 individualized inquiry, but the fact that there is this
3 available process that thousands of people are utilizing every
4 day to go through this process and that the stay mechanism to
5 protect the review of those claims that we've set forth in
6 those two declarations.

7 So in short, there's nothing extraordinary about the
8 fact that people are going back to Iraq and this is not also
9 not an indication of a change in policy. There have been
10 charter flights in the past to Iraq. The charter flight in
11 most instances is required when someone doesn't have travel
12 documents or is not cooperating in the removal, so if an
13 individual has an unexpired passport, I believe in the past few
14 years immediately, there had been charter flights that we've
15 indicated I think here in 2007 and 2008, it's in the
16 declaration, but there was a period of time where the Iraqi
17 government would only allow people to be returned there if they
18 had an unexpired passport and were on a commercial flight.
19 What has changed with some diplomatic negotiations now is that
20 we're able once again to use a charter flight versus a
21 commercial flight and then people can be removed via that
22 avenue without the burden of having the travel document that
23 would be required if you were to go back on a commercial
24 flight.

25 THE COURT: I wanted to ask you about the situation

1 in Iraq. The claim by the government is that the returnees
2 would not be returned to ISIS controlled areas. There's a
3 counter-declaration that was filed this morning by a petitioner
4 is saying no area is really secure an areas that are currently
5 not controlled by ISIS may well end up returning to the control
6 of ISIS. I wanted to get your response to that
7 counter-declaration.

8 MR. SILVIS: Sure, your Honor and I think this gets
9 into why this is such a difficult determination for this Court
10 to make because it really gets individualized again into what
11 group you belong to, whether ISIS would target you or any group
12 would target you based on some particular characteristic that
13 you have versus, you know, whether you could be someone who
14 could go back and live more broadly across the country and this
15 forum just isn't well-suited to make those determinations.
16 There hasn't been a broad, executive, you know, decision on
17 whether people can return or not so for an individual, the CAT
18 itself as we've indicated in our responsive pleading, it's not
19 a self-executing treaty. It only exists as a relief to removal
20 to the extent that it exists in removal proceedings and that
21 someone can bring it as a defense from removal itself. So and
22 I think what we're touching on with these declarations and
23 counter-declarations is that has to be determined in the first
24 instance in an immigration court and then the Board on then on
25 PFR where then a federal court can review that claim and see,

1 you know, whether that's, umm, whether they can in fact be
2 returned and then that's where that legal issue needs to be
3 determined and the facts of that case. I don't think the
4 Court's suggesting that it could do that here on a class-wide
5 basis even if there were a broader determination that
6 individuals can be returned or that there would be any basis to
7 enjoin removals widespread to the country of Iraq, that there
8 would be any jurisdiction of this Court to do so.

9 THE COURT: I asked petitioners' counsel about
10 whether there should be or needs to be a final hearing on this
11 piece of the case, the injunction piece of the case if I were
12 to grant a preliminary injunction. What's the government's
13 view on that?

14 MR. SILVIS: To grant -- if the Court were to grant a
15 preliminary injunction now?

16 THE COURT: Right. Would we need to proceed to a
17 final hearing? The way we would typically do if we granted a
18 preliminary injunction, obviously it's only a preliminary
19 injunction in most cases then if the matter remains to be
20 contested, there needs to be a final hearing, a trial or some
21 other kind of hearing to make a determination whether the
22 injunction should be made permanent. We do have an unusual set
23 of circumstances in this case and my question is would there
24 need to be some future hearing to address whether the
25 injunction should be made permanent or is there any need for a

1 further hearing on the issues raised by the motion for
2 preliminary injunction?

3 MR. SILVIS: Well, from what I understand
4 petitioners' counsel to have said in her opening remarks, it
5 looks like what they seek to do is put ongoing burden on the
6 government to produce, to provide information about maybe new
7 individuals who might be subject to this, to provide reporting
8 on different information, to provide files so at that point it
9 seems like it would be an ongoing injunction until, and I don't
10 know exactly when it would end. I mean, if someone, for
11 instance if someone in this case were not detained, it may be a
12 long time before they even got to the PFR process so this Court
13 if it were to do that in a preliminary basis, I mean, it could
14 be, it could be years I think before someone not detained could
15 get to that stage in the proceedings. So I guess in a shorter
16 response I think to your Honor's question, I would say that the
17 government would continue to assert the lack of jurisdiction
18 under the habeas, this simply is not a habeas remedy here that
19 can be heard and really when you look at the underlying relief
20 that they're seeking, they're not really suggesting here that
21 they can get the relief, the reopening that they need in this
22 Court. This Court can make the CAT claim. What they're saying
23 is they want time here to proceed in another forum so that they
24 can relief there and that relief isn't, it's just not a proper
25 basis for any type of injunctive relief to time in one forum so

1 they can adjudicate the merits of a claim in another forum.

2 THE COURT: No, I know, but I'm asking a different
3 question. I'm asking whether we're going to need to have
4 another hearing addressing whether the injunction should be
5 made permanent. I'm not asking about the various grounds the
6 government has asserted why I shouldn't enter a preliminary
7 injunction at all. I understand that position of the
8 government. I'm saying if I were to grant a preliminary
9 injunction, would we need to, for example, take discovery on
10 any of the issues that would be covered in the analysis of a
11 preliminary injunction; irreparable harm, balance of harms, the
12 merits issues? Would we need to continue to address any of
13 that as part of this case?

14 MR. SILVIS: I think that on the first part, to the
15 extent the Court even entertains a preliminary injunction in
16 this case, it would have to be the most narrow of ones to the
17 extent to allow the people who, to file a motion to reopen at
18 the very least because that is really the starting point, if
19 they're going file a motion to reopen before the immigration
20 court or before the BIA because once they've had a period to do
21 that, it seems like there wouldn't be any -- they've already
22 availed themselves of the process that's available and it
23 should expire within a reasonable period of, again, we're not
24 consenting or agreeing that a preliminary injunction should
25 issue at all, but to the extent it would, if there's some

1 concern about they haven't had enough time to do it, I don't
2 see any reason why it would have to extend just for that first
3 step for those individuals who although they've had access for
4 years and have access now, can somehow claim that they haven't.
5 If they had a period to do that, but why an injunction would go
6 beyond that, clearly people now are on notice that they could
7 be removed or more effectively be removed than they can in the
8 past. So I think the -- it would have to be the most narrow I
9 guess for the preliminary stage and then at, whatever would
10 exist after that point in a permanent, there would probably
11 need to be further hearings because, you know, we're talking
12 about a mandatory injunction against the government requiring
13 something that has to be done for this group that doesn't
14 have to be done for anyone else who's in immigration
15 proceedings.

16 THE COURT: On your first point regarding when the
17 preliminary injunction would end for any particular person who
18 might avail himself or herself of this benefit, I understood
19 the petitioners to be arguing that they're entitled to some
20 kind of judicial review, that's their theory and the judicial
21 review is really if the Court of Appeals, it's not in the
22 immigration courts, the immigration court's are really just a
23 arm of the Attorney General. So if that's their theory, that
24 they're entitled to judicial review under habeas concepts, why
25 wouldn't the injunction have to continue until they've had an

1 opportunity to get to the Court of Appeals, file a motion for a
2 stay of petition for review with the Court of Appeals?

3 MR. SILVIS: Well, habeas clearly doesn't apply in
4 this context. We're not challenging detention. So we're not
5 talking about statutory habeas and we're not talking about
6 traditional habeas and the idea that you could even use habeas
7 in a context like this to prevent a removal or transfer to Iraq
8 is clearly been and it's in our papers, it's clearly been
9 rejected. There's a process here. There's no suspension
10 clause. It's satisfied by the process that's in place, but
11 that said, there'd have to be some finding that the process,
12 that administrative process and then that followed by the Court
13 of Appeals in the PFR, the judicial review that may be had
14 there is somehow inadequate. That's what the Constitutional
15 standard is. Assuming that the suspension clause would even
16 apply to this case which we argue it doesn't, it would only,
17 the only question is whether there's an adequate and available
18 proceeding so we would need a lot more evidence to show that
19 that process isn't inadequate. All we have now are allegations
20 that somehow this is not inadequate, but the evidence supplied
21 by the government for the purpose of this hearing shows that's
22 not the case, that these motions are being adjudicated and
23 stays are being granted where appropriate and that not only
24 that, there are these procedures set up specifically to deal
25 with these emergent-type situations so there would at least to

1 even extend it to find that there isn't an adequate and
2 available forum which the petitioners would have to do, it
3 would have to be some more factual basis because ultimately
4 this is petitioners' burden to show. It's their, they're the
5 ones requesting the preliminary injunction.

6 THE COURT: So let me ask you are you saying then
7 that we might have to schedule a further hearing assuming I
8 were to grant the preliminary injunction, but we'd have to
9 schedule a further hearing where the parties could present a
10 full-dress presentation of evidence on the adequacy of the
11 immigration courts and petition for review process?

12 MR. SILVIS: I think that would be something we would
13 continually raise because it would be our objection at that
14 point that this injunction is proceeding or any future
15 injunction would be an improper use of habeas or this Court's
16 jurisdiction itself so that may become necessary, but I think
17 it depends in part on how the Court tailors. I mean, it's
18 possible that this case could proceed and the Court could have
19 a preliminary injunction that only lasted long enough until the
20 motion, until anyone had the opportunity or enough time to file
21 a motion to reopen. If you'll recall when this case initially
22 started, I think the plaintiffs were asking for like two months
23 to just have enough time to do so and we're basically at that
24 point now and I understand there's some indication well, we
25 don't know who everyone is and that type of thing, but, you

1 know, there are -- people are on notice now that this case is
2 going on and that they should have been on notice that they
3 have removal orders that could have been executed at any time
4 and so if they thought that they needed to -- that the
5 execution of that order would result in them being returned to
6 somewhere, so it's really incumbent on the petitioners or
7 anyone who could fall into a potential class to avail
8 themselves of their own rights. We expect people to do that in
9 other contexts of themselves all of the time so sort of this
10 protection in place, this special protection in place for
11 procedure, administrative procedure that has been available and
12 for the entire time anyone here has been in removal proceedings
13 and could have availed themselves of that before. I mean, that
14 would be a truly extraordinary exercise of this Court's in this
15 case.

16 THE COURT: Let me ask you about the motion for class
17 certification. I know it was just filed. I don't know if the
18 government's really had a chance to study it or even read it,
19 but if you are able to answer this question, I'd like to know
20 your view on how that motion should be addressed relative to
21 the matters that we're addressing here in connection with the
22 motion for a preliminary injunction. Is it on an entirely
23 separate track? Is it something that we should be factoring in
24 in deciding this motion? The broad essay question.

25 MR. SILVIS: Sure. I think counsel's had very little

1 time to review that motion so to the extent to sort of help on
2 a preliminary basis answer your Honor's question, I think that
3 the government's strong position is that any preliminary relief
4 can extend, you know, shouldn't extend beyond today, but
5 certainly not by Monday. So at that point if there's a motion
6 for class certification that the Court is going to entertain,
7 we would just do that in the normal course, but for multiple
8 reasons we think that the class certification isn't appropriate
9 and I guess we'll get to that in the briefing, but sort of the
10 underlying part there is again this is a highly individualized
11 determination for each individual and we've already seen people
12 who don't want to be part of this class and some people that
13 might have different relief that's available to other people,
14 so that would be our position on class cert, but I think though
15 to answer the Court's question that I don't -- that would
16 probably -- the injunction would expire, any preliminary relief
17 would expire on Monday and going forward the Court could
18 entertain briefing on the class cert.

19 THE COURT: When you say preliminary relief would
20 expire on Monday, do you mean the current order that expires
21 11:59 on Monday? The government's view is that that should be
22 the end of any stay and I should be denying the motion for a
23 preliminary injunction and then moving on to the class
24 certification? Is that the government's view?

25 MR. SILVIS: Yes.

1 THE COURT: Okay.

2 MR. SILVIS: Just with the caveat, well, if the Court
3 could do it at that point, but also that the case would be
4 dismissed entirely because of a lack of jurisdiction, but I
5 imagine the Court would want to hear about that in a later
6 briefing.

7 THE COURT: All right, but if I were to agree with
8 the government, I could agree on any number of grounds, right?
9 If I agreed on jurisdiction, that would be the end of at least
10 this piece of the case. I think there's still a detention
11 issue that might be alive or I might agree with the petitioners
12 that I do have jurisdiction, but that they haven't made out the
13 traditional equitable factors necessary for the grant of a
14 preliminary injunction in which case theoretically the case
15 might proceed, but it just wouldn't proceed with a preliminary
16 injunction. Maybe it then needs to move on to another phase
17 where we consider everything based on a full factual
18 development and a full presentation of evidence and see if the
19 petitioners are able to satisfy all the equitable factors for
20 injunctive relief. Those are at least some of the
21 possibilities, right?

22 MR. SILVIS: Correct. Yeah, various things. The
23 Court could find the basis for a preliminary injunction and
24 then we would move forward with the briefing on the class cert.
25 The Court could deny any sort of preliminary relief, but still

1 consider whether there was a basis for another type of
2 injunction. I mean, that would -- I don't think that
3 plaintiffs would be or the petitioners would be precluded from
4 making another attempt at that point. If the Court finds that
5 on the factual record in this case that or on this motion that
6 they have not satisfied the burden that they must to get
7 preliminary relief, I don't see -- it seems that they may be
8 able to bring it later if they further developed the factual
9 record and show that in fact this process is inadequate and
10 available. That's a -- they could probably bring that later in
11 the case even if the preliminary injunction expires. I
12 think -- does that answer your Honor's questions?

13 THE COURT: I believe it does.

14 MR. SILVIS: Just a -- I spent a lot of time I think
15 addressing the Court's, we've covered in the brief the reasons,
16 the four factors under Winter and why the preliminary
17 injunction or stay in this case shouldn't issue, I think they
18 are in there and I think we've sort of made clear at least at
19 this point the government's position about the jurisdictional
20 limitations and the Court doing it and that habeas is not
21 available especially when we have this process that's adequate
22 and available that's been accepted by every Court of Appeals
23 who've considered it.

24 There were some individual points that I don't know
25 that are sort of not related to the preliminary injunction

1 motion unless, umm, that we could address now or later.

2 THE COURT: Go ahead.

3 MR. SILVIS: Okay. There was question about -- I
4 guess there was a suggestion about some discovery obligation
5 that's due today that the government has to produce as evidence
6 and just to clarify that point, the Court's status conference
7 order required the government to use the best efforts for this
8 group of non-detained individuals, to provide the same
9 information that we were provided last week for the detained
10 individuals. So there's no hard deadline to do so today.
11 We're continuing to work on that. It's not as easy of a task
12 as some might assume, but just to clarify that point there's no
13 deadline and we're not in any violation of any court order on
14 what's due today.

15 I think we covered the other points that were raised
16 that were not directly related in various portions. I know
17 that there's this declaration from another case from a
18 deportation office, officer, I think it was a case before Judge
19 Borman about the availability of these charter flights and I
20 think, maybe petitioners' counsel would say what the
21 distinction is here. Our point about charter flights or
22 non-charter flights is that any change that they can point to
23 that's recent isn't the result of not removing people before,
24 there's just may be an ease that now we can do these charter
25 flights again and that's what the government is doing. They're

1 using these flights again as basis, as a result of the
2 negotiations with the government of Iraq, but there's, whether
3 the person's removed, you know, via charter or whether they're
4 removed on a commercial flight because they have travel
5 documents I don't think really has anything to do with the
6 underlying merits or facts in this case so I guess to sum up
7 and of course if the Court has anymore questions, we'll be here
8 of course, but the government's position is that the motion for
9 preliminary injunction should be denied or for a stay, that
10 that process, Congress has set for the review of these very
11 claims with a stay available. They've shown no reason that
12 that process is inadequate so they've failed to meet the
13 extraordinary remedy or extraordinary showing that they would
14 have to do to satisfy this preliminary relief against the
15 government so the motion should be denied. Thank you.

16 THE COURT: All right, thank you. All right any
17 rebuttal?

18 MS. AUCKERMAN: So as this Court I think correctly
19 noted, the fact that there has been this temporary stay has
20 been absolutely critical to the fact that some individuals have
21 been able to file these motions to reopen. It's clear from the
22 government's declarations that there was a charter flight
23 scheduled for June. I don't believe there's a direct date.
24 Many of these motions were not filed until after that and I'd
25 point the Court in particular to the declaration of Mr. Peard

1 which is I believe it's page ID 22254 who's working with
2 detainees in Florence. He describes how Latham and Watkins has
3 offered pro bono services and they have 50 attorneys working on
4 this during the week of July 17th and he writes despite the
5 surge in resources on behalf of Hamama class members in
6 Arizona, it's unlikely that the Latham team will be able to
7 finalize its motions to reopen before the expiration of the
8 current TRO at midnight on July 24th, 2017. So the fact that,
9 umm, the fact that some motions have been filed and there have
10 been some motions filed, but many of those have been filed as a
11 result as this Court pointed out of the very stay that this
12 Court has entered that the government has objected to.

13 We know, umm, the information that we have is that,
14 from their affidavits is there were 79 motions to reopen filed
15 in Detroit. There are of course 234 detained individuals. I
16 don't know if some of those are non-detained individuals. You
17 know, that's one of the pieces of information that we've been
18 requesting so that we can assess how this is moving. We know
19 that many individuals still do not have lawyers. Prior to the
20 government's disclosures of the individuals who are detained,
21 we'd known about 145 individuals, people who had contacted us
22 through their attorneys or through family members. Somewhere
23 between 24 and 40 of those are still unrepresented. There's an
24 additional approximately 90 individuals that we've learned
25 about as a result of the government's productions. We do not

1 know if those individuals have counsel so there are many people
2 who still don't have counsel.

3 I think it's important in terms of thinking about the
4 time frame here to understand again how critical it is to get
5 these records and if you look at, umm, it's the Valenzuela
6 declaration and that's page ID 1877 and she writes that given
7 the urgency, and I'll read this slowly for the benefit of the
8 court reporter, my apologies.

9 "Given the urgency and the grievous harm that
10 individuals face if removed, attorneys must be
11 prepared to quickly gather whatever documents
12 are in the possession of the detained individuals,
13 family members or otherwise publicly available,
14 analyze what little documents they can obtain and
15 making filings at much quicker rates than is
16 otherwise advisable given the complexity of these
17 cases, potentially sacrificing effectiveness to
18 exigency."

19 So I think as the Court, the Court's staff, the
20 Court's clerks can appreciate, making, doing litigation where
21 lives literally hang in the balance under extreme time pressure
22 is not a good idea, right? It taxes, it taxes all the of us.
23 It has taxed the Court. It has taxed the Court's staff. It's
24 taxed the government. It's taxed petitioner's counsel and that
25 is true in this litigation, but it is also true for every one

1 of those individual attorneys who is sitting with a family that
2 is being torn apart and have to try to put together a motion to
3 reopen without the basic information that they need to do that
4 effectively and that's why we feel that the stay, you know,
5 that's why the stay needs to continue so that people have the
6 time that they need to effectively access the system, so that's
7 one of the first points I wanted to make.

8 With respect to -- okay, with respect to your
9 question about sort of the, a permanent injunction and kind of
10 what would happen down the road, as everyone's very aware, the
11 existing stay expires on Monday. If the Court wants to have
12 further hearings or additional evidence, we're certainly
13 prepared to put that on, but we think the Court has before it
14 what it needs to make a decision by Monday that there's, you
15 know, there's a lot of, there's quite a lot of filings.
16 There's a lot of evidence in the record already and the Court
17 can make a preliminary injunct -- issue a preliminary
18 injunction and set further hearings if it wants to if it
19 believes it needs that, but obviously something needs to happen
20 at this point.

21 I would just say in terms of the length of time that
22 this will extend, the individuals who are affected here are
23 very motivated to address this issue. I mean, they face
24 grievous harm and so we don't foresee this as something that's
25 going to extend in perpetuity. We see this as something that

1 by the very nature of the issues before you is going to have to
2 move forward and we believe that the reporting is essential
3 because it helps us and will help the Court ultimately just to
4 figure out if there is anything that needs to happen beyond
5 what happens now, but what we're asking for today is obviously
6 preliminary. It's based on, you know, the record evidence in
7 front of you and we think you certainly have enough to issue a
8 preliminary injunction.

9 With respect to the issue of individuals being
10 returned to non-ISIS territory, it's very clear from the
11 declarations of Lattimer and Heller and Smith and the report
12 from the U.N. high commissioner for refugees that any return of
13 American-affiliated individuals to Iraq regardless of what
14 location is very dangerous. We're not suggesting that this
15 Court needs to make those kinds of determinations. What we're
16 saying is given that, that danger is what makes out the
17 irreparable harm and is the reason why these individuals need
18 the Court's protection so that they can access the
19 administrative system and the Court of Appeals' petition for
20 review process to have their individual claims adjudicated. We
21 think given what -- well, what frankly I've learned about Iraq,
22 I think it's very likely that many of these claims will be
23 successful because of the tremendous danger the individuals
24 face, but we're not asking you to make that a determination.
25 All we're asking is for you to give the individuals the time

1 they need to actually access a system that can make those
2 determinations for them.

3 With respect to the issue of sort of the length of
4 time, as you noted I think absolutely correctly the issue here
5 is judicial review so the appropriate end-point is really at
6 the Court of Appeals. I would just note in addition that the
7 record contains some, um, some real concerning evidence
8 regarding the effectiveness of the stay process and individuals
9 being deported because of, you know, essentially problems with
10 the way that that process works and that's the Samona
11 declaration and I believe it's the Realmuto declaration as well
12 and the Scholton declaration have that information in it.

13 With respect to the question of these, umm, of the
14 travel documents, the relevant government declaration which is
15 at page ID 2005 indicates that those statistics include
16 individuals who have returned to Iraq on their own volition as
17 well as formal removals, right, so those are individuals who
18 are voluntarily returning and it further explains very clearly
19 that there has been a very, a significant change in the way
20 Iraq is handling these cases because, quote:

21 "Previously Iraqi government would only accept
22 its nationals that had unexpired passports and
23 only those travelling via commercial flights.
24 Now Iraq will authorize repatriation without
25 other indicia of nationality."

1 So I think it's undisputed that there's been a very
2 significant change. There may have been individuals who
3 voluntarily departed, but that hasn't -- these repatriations of
4 individuals who have been living in the community and who Iraq
5 previously wouldn't except, it's the people who we're talking
6 about, the people like Mr. Hamama, those individuals. They
7 were not being repatriated before, so I wanted to clarify that
8 point. I believe that's all I have, your Honor, unless you
9 have further questions.

10 THE COURT: Well, as I tell lawyers very often, I
11 have lots of questions, but I don't always ask them. Thank
12 you. All right, Mr. Silvis, is there anything else you wanted
13 to say on behalf of the government?

14 MR. SILVIS: Briefly?

15 THE COURT: Sure.

16 MS. AUCKERMAN: Actually, your Honor, could I just
17 make one, one point since this may be my last opportunity?

18 THE COURT: Go ahead.

19 MS. AUCKERMAN: I just wanted to say we certainly
20 hope that the Court will extend, grant the preliminary relief
21 that we've requested, but in the event that the Court would
22 decline to do so, we would just preserve for the record a
23 request for a stay pending appeal. In other words, that the
24 temporary stay be extended if the Court should decline our, um,
25 given the grievous irreparable harm that these individuals face

1 and the government's rush to send them to Iraq, we wanted to
2 make sure that if the Court disagrees with us, that they are
3 protected until the Court of Appeals has an opportunity to
4 review this, so I just want to place that on the record.

5 THE COURT: I understand. All right, Mr. Silvis?

6 MR. SILVIS: Thank you, your Honor. Just a couple
7 points in direct response, it's the petitioners' burden to show
8 via evidence and not mere speculation that the current system
9 is inadequate and unavailable and they haven't done that in
10 this motion and for that reason alone it should be denied.

11 Their -- the TRO that's in place certainly protects
12 those who were not diligent in pursuing any withholding claims
13 that they had and perhaps waited until they were literally
14 being transferred to be removed to Iraq, certainly gave them
15 the opportunity to file last-minute motions to reopen that
16 maybe they hadn't thought were necessary for years, but that
17 doesn't really get to the underlying question, the
18 Constitutional questions at issue here and the jurisdictional
19 questions of whether the process that's in place is adequate;
20 that had people exercised their, their statutory or, you know,
21 rights earlier, they wouldn't be in this situation. So that
22 doesn't go to the adequacy of the underlying procedures, it
23 goes to the diligence in exercising that and waiting until you
24 were right on the eve of removal to bring this claim, so that's
25 one point and I don't think any of these claims are tied

1 specifically from June 11th on or that there was any
2 indication. Some, I'm sure some Iraqis in a broader group
3 might have filed more recently before the June things, but a
4 lot have filed on the eve of after being arrested and seeing
5 that the removal war more imminent than maybe they expected.
6 So the TRO might have protected there, but that's not a proper
7 use and it doesn't show that the underlying system is
8 inadequate and unavailable and then just a second point, it
9 seems that some to the extent that there's been any change in
10 the policy in Iraq that it is now easier to remove certain
11 people to the United States -- from the United States to Iraq,
12 that's not a changed country condition to the extent that
13 you're getting withholding under CAT. If your claim is that if
14 I can't be removed because of relief that's available there,
15 that claim would exist independent of how easy it is for the
16 government to remove you. It seems the change that a lot of
17 people of this class are complaining about is they didn't think
18 living their lives here under a removal order mind you and
19 order of supervision that they could be removed because Iraq
20 just wasn't accepting them via this more expeditious process,
21 but that isn't -- that's not a CAT claim, that is just a claim
22 that you didn't think it was going to happen and that's not
23 something that this Court should protect with preliminary
24 relief. Thank you, your Honor.

25 THE COURT: All right. Anything else for the

1 petitioners?

2 MS. AUCKERMAN: No, your Honor. Thank you.

3 THE COURT: All right. Well, that concludes the
4 hearing on this matter. I do want to meet with the attorneys
5 in my jury room. My clerk's going to escort you there. Thank
6 you.

7 (Motion hearing concluded at 12:00 p.m.)

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C E R T I F I C A T E

I, David B. Yarbrough, Official Court
Reporter, do hereby certify that the foregoing pages
comprise a true and accurate transcript of the
proceedings taken by me in this matter on Friday, July
21st, 2017.

7/24/2017

Date

/s/ David B. Yarbrough

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